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No. 78-1455

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

EDGAR H. GILLOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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42

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provisions and rule involved	2
Statement	3
Reasons for granting the petition	7
Conclusion	13
Appendix A	1a
Appendix B	52a
Appendix C	54a
Appendix D	56a
Appendix E	59a
Appendix F	65a

CITATIONS

Cases:

Bond v. *Floyd*, 385 U.S. 116	11
Branzburg v. *Hayes*, 408 U.S. 665	12
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491	11
Elkins v. *United States*, 364 U.S. 206	10
Elrod v. *Burns*, 427 U.S. 347	11
Grand Jury Proceedings, In re, 563 F.2d 577	9, 10, 11, 13
Gravel v. *United States*, 408 U.S. 606	10, 11
Imbler v. *Pachtman*, 424 U.S. 409	10, 12
Jordan v. *Hutcheson*, 323 F.2d 597	11
Ker v. *California*, 374 U.S. 23	10

Cases—Continued

	Page
Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*, No. 77-1327 (March 5, 1979)	9
National League of Cities v. *Usery*, 426 U.S. 833	11
O'Shea v. *Littleton*, 414 U.S. 488	8, 10, 12
Powell v. *McCormack*, 395 U.S. 486	11
Stump v. *Sparkman*, 435 U.S. 349	10
Tenney v. *Brandhove*, 341 U.S. 367	6, 10
United States v. *Brewster*, 408 U.S. 501	6, 9
United States v. *Craig*, 528 F.2d 773, cert. denied, 425 U.S. 973, rev'd, 537 F.2d 957, cert. denied, 429 U.S. 999	7, 8, 9
United States v. *DiCarlo*, 565 F.2d 802, cert. denied, 435 U.S. 924	7, 9, 13
United States v. *Johnson*, 383 U.S. 169	6
United States v. *Nixon*, 418 U.S. 683	12
Wolfle v. *United States*, 291 U.S. 7	10

Constitutions, statutes and rules:

	Page
United States Constitution:	
Article I, Section 6, clause 1 (Speech or Debate Clause)	*passim*
Article VI, clause 2 (Supremacy Clause)	3, 9, 12
Tennessee Constitution, Article II, Section 13	6, 9
Hobbs Act, 18 U.S.C. 1951	3, 7
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962	4, 7
Travel Act, 18 U.S.C. 1952	4, 7
18 U.S.C. 1341	8
18 U.S.C. 1343	8

Constitution, statutes and rules—Continued

	Page
Federal Rules of Evidence:	
Rule 402	10
Rule 501	*passim*
Miscellaneous:	
H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. (1974)	10
2 *Weinstein's Evidence* (1977)	10
8 J. Wigmore, *Evidence* (McNaughton rev. 1961)	12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-51a) is reported at 587 F.2d 284. An earlier opinion of the court of appeals (App. D, *infra*, 56a-58a) is not reported, although the judgment order in that case is reported at 559 F.2d 1222 (table). The opinions of the district court (Apps. E and F, *infra*, 59a-74a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 52a-53a) was entered on November 1, 1978. A timely petition for rehearing was denied on January 17, 1979 (App. C, *infra*, 54a-55a). On February 7, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including March 18, 1979 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Federal Rule of Evidence 501 encompasses a common-law "legislative privilege," coextensive with the Speech or Debate Clause of the Constitution, that prohibits the federal government from inquiring into the legislative acts of a state legislator in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Speech or Debate Clause of the United States Constitution, Article I, Section 6, clause 1, provides in part:

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT

On August 12, 1976, respondent, then a Tennessee state senator, was indicted in the United States District Court for the Western District of Tennessee on five counts of obtaining money under color of official right (18 U.S.C. 1951), one count of using an in-

terstate facility to distribute a bribe (18 U.S.C. 1952), and one count of participating in an enterprise through a pattern of racketeering activity (18 U.S.C. 1962). The indictment was based on respondent's alleged abuse of his legislative position to extract money from victims in two separate schemes—the first to prevent the extradition of a Tennessee prisoner to Illinois, the second to procure master electrician's licenses for four individuals (App. A, *infra*, 3a-4a).

Before trial, respondent moved to suppress evidence of his legislative acts performed in connection with the alleged extortion schemes. Respondent claimed that a common-law privilege for state legislators, equivalent in scope to the protection afforded federal congressmen under the Speech or Debate Clause, precludes the federal government from introducing any evidence of "legislative acts or motivation therefor" in a federal criminal trial (App. E, *infra*, 59a). The district court granted the motion, holding that a common law privilege akin to the Speech or Debate Clause privilege exists under Rule 501 of the Federal Rules of Evidence. The court stated that such a legislative privilege is necessary "to protect the integrity of the [state] legislative process by insuring the independence of individual legislators * * * [and] to preserve the constitutional relation between our federal and state governments in our federal system" (App. F, *infra*, 73a).

The government appealed, and the court of appeals vacated the district court's blanket ruling

and remanded for a more specific finding with regard to particular items of the government's proposed case (App. D, *infra*, 56a-58a). On remand, the government tendered an offer of proof setting forth with specificity the categories of evidence to be used at trial (App. A, *infra*, 39a-51a). The district judge again granted respondent's renewed motion to suppress, except for a few limited items such as the fact that respondent was a state senator, and a general explanation of the operation of the bicameral legislature of Tennessee (App. E, *infra*, 59a-64a).

Thereafter, the government prosecuted a second appeal. A divided court of appeals held that a legislative privilege exists under Rule 501, but that the district court had construed that privilege too broadly with regard to certain kinds of evidence.[1] In reaching its conclusion, the court initially stated (as the parties had previously conceded) that neither the

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[1] The court of appeals substantially affirmed the district court's rulings with regard to the inadmissibility of such matters as respondent's introduction of a bill or his official request for an opinion of the state attorney general. However, relying on this Court's pertinent Speech or Debate Clause decisions, the court of appeals held admissible (1) an opinion of the Tennessee Attorney General regarding the extradition of one of respondent's alleged victims, rendered at respondent's request, (2) tapes and testimony concerning conversations between respondent and his alleged victims, and (3) the governor's veto message with regard to an act sponsored by respondent (App. A, *infra*, 16a-26a). For purposes of this petition, we assume *arguendo* that if a legislative privilege exists, the court of appeals applied it correctly to the proffered evidence.

Tennessee constitutional legislative privilege[2] nor the Speech or Debate Clause directly applies to a federal prosecution of a state legislature (App. A, *infra*, 2a-3a). The court also noted that this Court has never passed upon the existence of a common-law legislative privilege, and, indeed, that two other courts of appeals had squarely held that Rule 501 does not encompass such a privilege (*id.* at 15a). Nonetheless, the court concluded that "the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases [of the Supreme Court]" justify recognition of a common-law legislative privilege in the context of a federal criminal prosecution (*ibid.*).[3]

Judge Weick dissented, arguing that "the federal courts ought not to innovate and create a new privilege for the protection of state legislators who violate the criminal laws of the United States" (App. A, *infra*, 26a-27a). Judge Weick explained that because the speech or debate privilege emerged as a means of

[2] Article II, Section 13 of the Tennessee Constitution provides that:

> Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

[3] In particular, the court cited *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); and *United States* v. *Brewster*, 408 U.S. 501 (1972).

ensuring the independence of coordinate branches of the same government, the doctrine of separation of powers does not justify extending the privilege to the context of federal prosecutions of state legislators (*id.* at 31a-33a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question under Rule 501 of the Federal Rules of Evidence concerning whether a common-law legislative privilege precludes the federal government from introducing evidence of legislative acts at the criminal trial of a state legislator. As the court below expressly recognized (App. A, *infra*, 15a), its decision squarely conflicts with the decisions of two other courts of appeals. See *United States* v. *Craig*, 528 F.2d 773 (7th Cir.), cert. denied, 425 U.S. 973 (1976), rev'd, 537 F.2d 957 (7th Cir.) (en banc), cert. denied, 429 U.S. 999 (1976); *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978). Moreover, the analysis of the court of appeals appears inconsistent with the relevant precedents of this Court. Because of these conflicts and because the creation of a common-law legislative privilege will substantially impair the federal government's ability to prosecute venal state legislators under various federal statutes,[4] review of this case by the Court is warranted.

[4] Here, of course, respondent was charged with violating the Hobbs Act, 18 U.S.C. 1951; the Travel Act, 18 U.S.C. 1952; and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962. The federal government has also prose-

1. In *United States* v. *Craig*, *supra*, a divided panel of the Seventh Circuit held that a common-law legislative privilege exists under Rule 501, but that the defendant state legislator had waived his privilege by testifying before the grand jury. 528 F.2d at 776-781. Judge Tone, in a concurring opinion, reasoned that no such privilege exists in the context of a federal prosecution of a state legislator. Judge Tone first pointed out that neither the Illinois nor the federal Speech or Debate Clause was implicated by a federal prosecution of a state legislator. *Id.* at 781-782. Next, primarily relying on *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), he noted that "common-law official immunity has not been extended to criminal liability." 528 F.2d at 728. Finally, the concurrence rejected the majority's assumption that such a privilege was justified by the doctrine of separation of powers. In this regard, Judge Tone stated that separation-of-powers principle applies to the relationship between coordinate branches of a single government but not to the federal prosecution of a corrupt state legislator. *Id.* at 783.

Subsequently, the Seventh Circuit granted the government's petition for rehearing en banc. By a 5-to-3 vote, the court of appeals adopted Judge Tone's opinion as the decision of the en banc court. Thereafter the First Circuit also refused to recognize a common-law legislative privilege under Rule 501.

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cuted state legislators under the mail fraud and wire fraud statutes, 18 U.S.C. 1341 and 1343. See, *e.g.*, *United States* v. *Craig*, *supra*, 528 F.2d at 774.

See *United States* v. *DiCarlo*, *supra*.[5] Thus, as a result of the decision below, a conflict with serious implications for the administration of the federal criminal laws exists among the courts of appeals. That conflict should be resolved by the Court.

2. Although this Court has never passed on the precise question presented here, various decisions strongly suggest that the court of appeals erred in holding that a federal common-law privilege cognizable under Rule 501 precludes the federal prosecutor from introducing highly probative evidence of respondent's extortion schemes at trial. Before turning to discuss these cases, we first note—as respondent has conceded—that neither the Speech or Debate Clause of the United States Constitution nor the similar privilege contained in the Tennessee Constitution (see note 2, *supra*) afford respondent any surcease in this case (App. A, *infra*, 3a). The former provision applies only to federal legislators, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, No. 77-1327 (March 5, 1979), slip op. 12; *United States* v. *DiCarlo*, *supra*, 565 F.2d at 805; *In re Grand Jury Proceedings*, 563 F.2d 577, 580-581 (3d Cir. 1977); *United States* v. *Craig*, *supra*, 528 F.2d at 782; see also *United States* v. *Brewster*, 408 U.S. 501, 516 n.10 (1972), and, given the express terms of Rule 501 and the Supremacy Clause, it is

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[5] In the interim, the Third Circuit in dictum stated that a somewhat circumscribed privilege exists. See *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977). Judge Gibbons filed a concurring opinion rejecting that dictum. *Id.* at 586-588.

clear that the existence of a state constitutional privilege is not determinative of the admissibility of evidence in a federal criminal proceeding. *In re Grand Jury Proceedings, supra,* 563 F.2d at 582; H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 7 (1974); 2 *Weinstein's Evidence* ¶ 501[03], at 501-24 to 501-25 (1977). See also Fed. R. Evid. 402; *Ker* v. *California,* 374 U.S. 23, 31-32 (1963); *Elkins* v. *United States,* 364 U.S. 206, 223-224 (1960); *Wolfle* v. *United States,* 291 U.S. 7, 12-13 (1934).

a. In concluding that federal common law "interpreted * * * in the light of reason and experience" (Fed. R. Evid. 501) dictates recognition of a legislative privilege, the court of appeals relied heavily on this Court's decision in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951). In that case, the Court held that a state legislator had an absolute official immunity from civil liability under the federal civil rights acts. But, as this Court has often stated, "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *.'" *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974), quoting from *Gravel* v. *United States,* 408 U.S. 606, 627 (1972). See also *Stump* v. *Sparkman,* 435 U.S. 349, 356 (1978); *Imbler* v. *Pachtman,* 424 U.S. 409, 428-429 (1976). Indeed, such civil immunities have been "recognized at least partly because the availability of criminal sanctions * * * affords alternative protections [against corrupt state legislators]." *In re Grand Jury Proceedings, supra,* 563 F.2d at 587 (Gibbons, J., concurring).[6]

b. Nor does the doctrine of separation of powers, which informs the Speech or Debate Clause, support the result reached below. "The Speech or Debate Clause was designed to assure a co-equal branch of the [federal] government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States, supra,* 408 U.S. at 616. A state legislator is simply not a part of a "co-equal branch of the government," and his prosecution for violations of federal law by federal authorities clearly effectuates Congress' intent in enacting those laws. In short, "the separation-of-powers principle * * * has no applicability to the federal [government's] relationship to the States." *Elrod* v. *Burns,* 427 U.S. 347, 352 (1976) (plurality opinion of Brennan, J.).[7]

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[6] Even with regard to civil matters, the protection afforded state legislators by the doctrine of official immunity appears to fall short of that accorded federal legislators by the Speech or Debate Clause. Compare *Bond* v. *Floyd,* 385 U.S. 116 (1966), and *Jordan* v. *Hutcheson,* 323 F.2d 597 (4th Cir. 1963) (injunction lies against state legislator) with *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975), and *Powell* v. *McCormack,* 395 U.S. 486, 501-506 (1969) (Speech or Debate Clause precludes injunctive relief against legislative acts of Congressmen).

[7] Neither does the federal government's prosecution of a corrupt state legislator implicate the Tenth Amendment concerns reflected in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). In that case, the federal government un-

c. The decision of the court of appeals also ignores the well-established principle disfavoring the creation or extension of evidentiary privileges. As explained in *United States* v. *Nixon*, 418 U.S. 683, 710 (1974) (footnote omitted): "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Accord, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 690 n.29 (1972); 8 J. Wigmore, *Evidence* § 2192 (McNaughton rev. 1961). And here, policy and precedent strongly indicate that the recognition of a common-law legislative privilege would be unreasonable and unwise. The federal prosecution of state legislators for federal crimes does not undermine the internal balance and separation of powers within the state government. Rather, it preserves the authority of the federal government, established in the Supremacy Clause of the Constitution, to protect the federal interests inherent in the federal criminal code. Moreover, the creation of a legislative privilege in the context of federal criminal prosecutions would blur the distinction purposefully drawn by the Court between federal criminal liability and federal civil liability[8] without appreciably protecting the independence of state legislators. *United States* v. *DiCarlo*, *supra*, 565 F.2d at 806; *In re Grand Jury Proceedings*, *supra*, 563 F.2d at 587 (Gibbons, J., concurring).

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constitutionally interfered with the essential functions of the state-qua-state. Here, the federal government is prosecuting a state legislator for extortion and other acts that undoubtedly violate state as well as federal law.

[8] See *Imbler* v. *Pachtman supra*, 424 U.S. at 428-429; *O'Shea* v. *Littleton*, *supra*, 414 U.S. at 503.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5335

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Western District of Tennessee,
Western Division.

Decided and Filed November 1, 1978.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

EDWARDS, Circuit Judge, delivered the opinion of the Court, in which ENGEL, Circuit Judge, joined. WEICK, Circuit Judge, (pp. 21-31) filed a separate dissenting opinion.

EDWARDS, Circuit Judge. The question posed by this case is whether a federally indicted Tennessee State Senator is entitled to the protection of a common law speech or debate privilege as to his legislative acts. The issue requires an examination of a good deal of ancient history.

In 1689, after nearly two centuries of struggle between the English monarchy and the English Parliament, the English Bill of Rights was wrung by Parliament from newly crowned monarchs. It declared

"that the Freedom of Speech and Debate or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." [1] It was the Constitution of the United States by adoption of the Bill of Rights in 1789 which first provided an enforceable guarantee of freedom of speech for all persons. But previously in 1787 the original Constitution (and the Articles of Confederation before it [2]) had enacted freedom of speech rights for members of Congress in the discharge of their official duties. Article I, § 6 of the United States Constitution provided (and provides) "any Speech or Debate in either House . . . shall not be questioned in any other Place."

Three states in 1787 had already adopted similar protections for their legislators. By now 43 states, including Tennessee, provide such constitutional protection for the legislative process. The working of the Tennessee Constitutional guarantee is:

> *Privilege of members.*—Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either

[1] 1 W. & M., Sess. 1, c. 2.

[2] Article V of the Articles of Confederation provided:

"freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress. . . ."

> House, they shall not be questioned in any other place.

TENN. CONST. art. II, § 13.

All parties to this litigation concede, however, that neither provision quoted above from either the United States or the Tennessee Constitutions is directly applicable to the instant prosecution. This indictment is laid under a federal statute which prohibits "extortion . . . under color of official right." Hobbs Act, 18 U.S.C. § 1951 (1976).[3] The Tennessee Constitution cannot provide any specific protection to this state legislator in this case because of the supremacy clause in the federal constitution, art. VI, clause 2. Of course, the United States Constitution's provision does not apply directly, since appellee is not a member of either house of the United States Congress.

The question which remains is whether a federal common law privilege for state legislators essentially equivalent to the provisions contained in the English Bill of Rights and the United States and Tennessee Constitutions should be recognized by the federal courts in admitting evidence in a Hobbs Act case. If so, there is a second and less important question pertaining to the scope of the privilege to be applied in this case.

THE FACTS

The seven-count indictment against Tennessee State Senator Edgar H. Gillock charged him with 1) pro-

[3] Other counts charged Gillock with violating 18 U.S.C. §§ 1952 and 1962 (1976).

curing and agreeing to accept a bribe "under color of official right" for using his official office to prevent the extradition of one James Williams from Tennessee to Illinois; 2) attempting to obtain $5,000 apiece from four named individuals for using his office to attempt to procure for them master electrician's licenses, and 3) being engaged in the racketeering enterprises referred to, in violation of TCA § 39-802 which prohibits a member of the Tennessee legislature from agreeing to accept anything of value for exercising the discretion of the public office which he holds.

This case has been the subject of numerous motions and proceedings in the United States District Court for the Western District of Tennessee. In those proceedings defendant Gillock moved to dismiss the indictment and to suppress all the evidence concerning his legislative activities. The District Court denied motions to dismiss the indictment, but granted motions to exclude much of the evidence, holding that, as state senator, defendant Gillock had an evidentiary speech or debate privilege under Rule 501 of the Federal Rules of Evidence.

The government then appealed to this court under 18 U.S.C. § 3731 (1976), and this court remanded for the writing of a more particularized record of the evidence to be dealt with. In the District Court the government filed a detailed offer of proof which we have reproduced as an Appendix to this opinion. The District Judge then made detailed rulings thereon, and on the same grounds, suppressed many items in

the offer of proof. The government then brought the instant appeal under 18 U.S.C. § 3731 (1976).

THE PRIVILEGE

The basic question, as the District Judge recognized, is whether or not defendant Gillock is entitled to a common-law speech or debate privilege. Although the question has divided the Circuit Courts and has never been passed on by the Supreme Court, we hold that he is so entitled, albeit we would describe its limits somewhat more narrowly than did the District Judge.

The long history of the legislative speech or debate clauses which we have described at the beginning of this opinion forms the background of our decision. The government's brief seems to suggest that there is no need for such protection of legislative branches of government (whether national or state) when the powers of government are divided (as in the United States and Tennessee Constitutions) between three co-equal bodies—the Executive, the Legislative and the Judiciary. This argument would have more appeal if American history demonstrated that no national or state executive had ever reached for power so as to infringe upon the rights of a legislative branch. From the beginning of the history of the United States to very recent years, however, there have been recurrent conflicts over power which have brought the President and Congress (to say nothing of Governors and Legislatures) into grave conflict.

It is easy to conceive of the abuse of federal prosecutorial power against members of state legislatures of an opposite political persuasion.

The problem of this case is not constitutional immunity. No constitutional protection applies to defendant Gillock in this federal prosecution. What is at issue is his claim, upheld by the District Judge, that evidence concerning his legislative acts should be suppressed because they are protected by a common-law privilege.

Chief Judge Bailey Brown who conducted the hearings and entered the suppression order from which this appeal is taken reasoned as follows:

> We conclude that, under Rule 501 of the Rules of Evidence, defendant has a speech or debate privilege with respect to, but only with respect to, his legislative acts and motivation therefor because we believe that such is required, as stated in the Rule, "by the principles of the common law" as they are interpreted "in the light of reason and experience." The reasons for the conclusion are these. The privilege is necessary, to paraphrase Chief Justice Burger in the *Brewster* case, to protect the integrity of the legislative process by insuring the independence of individual legislators, not simply for the personal or private benefit of legislators. To the extent that venal legislators might go unconvicted because of the government's being barred from proving legislative acts and motives, this is the price that the Founding Fathers believed we have to pay for legislative independence. Such freedom of our state legislators from federal criminal prosecutions, which call into question their legislative acts and motives, is necessary to preserve the constitutional relation between our federal and state governments in our federal system.

We believe that under the historical background we have recited above, Rule 501 of the Federal Rules of Evidence authorized Judge Brown (and authorizes and requires us) to find and protect a speech or debate privilege. Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

We have indicated above that lessons "of reason and experience" have motivated recognition of legislative speech or debate immunity or privilege in 43 of the 50 states and in the English Bill of Rights, the Articles of Confederation of the United States, as well as the United States Constitution.

While the United States Supreme Court has never passed upon the precise problem which we face, it has recognized the immunity from civil suit of a state legislator on reasoning which we think applicable to this case:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for "seditious" speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St. Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II. See *Stockdale* v. *Hansard*, 9 Ad. & El. 1, 113-114 (1839).
>
> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill

> of Rights: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." Article I, § 6, of the Constitution provides: ". . . for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."
>
> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.
>
> *Tenney* v. *Brandhove*, 341 U.S. 367, 372-73 (1951).

In the fundamental case dealing with the protection granted by the United States Constitution's provision for protection of speech or debate, the Supreme Court, through Chief Justice Burger said:

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legis-

lative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in *United States* v. *Johnson*, 383 U.S. 169 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it

> "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *Id.*, at 178 (footnote omitted).

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the Legislative Branch to acknowledge that our history does not reflect a catalogue of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the 17th and 18th century English kings, without meaningful recourse to a writ of habeas corpus. In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause in the context of a criminal charge against a Member of Congress.

(a) In *United States* v. *Johnson, supra*, the Court reviewed the conviction of a former Representative on seven counts of violating the federal conflict-of-interest statute, 18 U.S.C. § 281 (1964 ed.), and on one count of conspiracy to defraud the United States, 18 U.S.C. § 371. The Court of Appeals had set aside the conviction on the count for conspiracy to defraud as violating the Speech or Debate Clause. Mr. Justice Harlan, speaking for the Court, 383 U.S., at 183, cited the oft-quoted passage of Mr. Justice Lush in *Ex parte Wason*, L. R. 4 Q. B. 573 (1869):

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings *with respect to anything they may do or say in the House.*" *Id.*, at 577 (emphasis added).

In *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), the first case in which this Court interpreted the Speech or Debate Clause, the Court expressed a similar view of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204. This statement, too, was cited with approval in *Johnson*, 383 U.S., at 179. Our conclusion in *Johnson* was that the privilege protected Members from inquiry into legislative acts or the motivation for actual performance of legislative acts. *Id.*, at 185.

In applying the Speech or Debate Clause, the Court focused on the specific facts of the *Johnson* prosecution. The conspiracy-to-defraud count alleged an agreement among Representative Johnson and three co-defendants to obtain the dismissal of pending indictments against officials of savings and loan institutions. For these services, which included a speech made by Johnson on the House floor, the Government claimed Johnson was paid a bribe. At the trial, the Government questioned Johnson extensively, relative to the conspiracy-to-defraud count, concerning the authorship of the speech, the factual basis for certain statements made in the speech, and his motives for giving the speech. The Court held that the use of evidence of a speech to support a count under a broad conspiracy statute was prohibited by the Speech or Debate Clause. The Government was, therefore, precluded from prosecuting the conspiracy count on retrial, insofar as it de-

pended on inquiries into speeches made in the House.

United States v. *Brewster*, 408 U.S. 501, 507-10 (1971). (Footnotes omitted.)

In *United States* v. *Johnson*, 383 U.S. 169 (1965), Justice Harlan said for the Court:

> In *Tenney* v. *Brandhove*, 341 U.S. 367, at issue was whether legislative privilege protected a member of the California Legislature against a suit brought under the Civil Rights statute, 8 U.S.C. §§ 43, 47(3) (1946 ed.), alleging that the legislator had used his official forum "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances . . . ." 341 U.S., at 371. The Court held a dismissal of the suit proper; it viewed the state legislative privilege as being on a parity with the similar federal privilege, and concluded that
>
> > "The claim of an unworthy purpose does not destroy the privilege. . . . The holding of this Court in *Flecher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S., at 377.

III.

Kilbourn and *Tenney* indicate that the legislative privilege will be read broadly to effectuate its purposes; neither case deals, however, with a criminal prosecution based upon an allegation

> that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests. However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions.
>
> *United States* v. *Johnson*, *supra* at 179-80.

In the most recent Supreme Court case dealing with the Speech or Debate Clause, Chief Justice Burger said:

> The Clause is a product of the English experience. *Kilbourn* v. *Thompson*, *supra*; *United States* v. *Johnson*, *supra*, at 177-179. Due to that heritage our cases make it clear that the "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson*, 383 U.S. 169, 181 (1966)," *Gravel* v. *United States*, *supra*, at 617. That role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause. Rather, it "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . . ." *United States* v. *Brewster*, *supra*, at 508. Thus we have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as

> those initiated by the Executive Branch. *Kilbourn* v. *Thompson*, *supra*; *Tenney* v. *Brandhove*, *supra*; *Doe* v. *McMillan*, *supra*; *Dombrowski* v. *Eastland*, *supra*.
>
> *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975).

See also Doe v. *McMillan*, 412 U.S. 306, 311 (1973); *Dombrowski* v. *Eastland*, 387 U.S. 82, 84 (1967).

By citing these Supreme Court cases, we do not suggest that any one of them supplies precisely controlling law as to our present case.

The Courts of Appeals do supply well-argued opinions on both sides of the general question we confront here: *United States* v. *Craig*, 528 F.2d 773 (7th Cir. 1976), *cert. denied* 425 U.S. 973 (1976) [*Craig I*]; *United States* v. *Craig*, 537 F.2d 957 (7th Cir. 1976) (en banc) [*Craig II*], *cert. denied sub nom. Market* v. *United States*, 429 U.S. 999 (1976); *United States* v. *DiCarlo*, 565 F.2d 802 (1st Cir. 1977); *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977).

While we respect the views of the judges in the Seventh and First Circuits who have rejected the existence of a common law speech or debate privilege, we feel, as did the Seventh Circuit dissenters and the Third Circuit majority, that the long history and the felt need for protection of legislative speech or debate and the repeated and strong recognition of that history in the cases we have cited from the Supreme Court, fully justify our affirming Chief Judge Brown in his protection of the privilege in this case.

We should also comment upon the government's argument *in terrorem* that for the federal courts to recognize the speech or debate privilege for this Tennessee State Senator would open the door to similar claims on behalf of members of lesser legislative bodies like city councils and county boards. This opinion, however, affords no basis for such an extension. Nor will it until and unless a history of "reason and experience" within the meaning of Rule 501 can be cited, which includes recognition of a speech or debate immunity or privilege for city councilmen or county board members in the constitutions of a large majority of the states of the union. This record and our research do not indicate that any state has as yet granted such recognition.

THE EXTENT OF THE PRIVILEGE

Since we affirm the District Judge in holding that Gillock is entitled to a common law speech or debate privilege, we turn to the question also posed in this appeal as to the extent of the privilege. The District Court suppressed Items 3, 8, 9, 11, 12, 13 (found in the Appendix) and the governor's veto letter, *infra*. The government concedes that if the privilege is recognized, Items 9, 11, and 13, which deal directly with Gillock's legislative activity are correctly excluded. It, however, claims that the following items are not part of the legislative process and hence should be admitted at trial:

Item No. 3: (a) On March 6, 1975, the defendant made an official request in writing for an opinion from the Attorney General concerning "Extradition on a Misdemeanor." The request was made to Ray Ashley, Attorney General, with carbon copy to the Assistant Attorney General who had represented the state at the extradition hearing. (A copy is attached as Exhibit A.)

(b) On March 13, 1975, the defendant's request was routed to the Assistant Attorney General for preparation of a reply. (Attached as Exhibit B.)

(c) On March 27, 1975, the Office of the Attorney General rendered an opinion in response to the defendant's request. (Attached as Exhibit C.)

* * *

Item No. 8: On March 25, 1975, Howard recorded a call from the defendant, during which the defendant advised her, in substance, that he had caused the extradition to be held up and could have blocked the extradition because the extradition hearing officer had appeared before the defendant's committee on a matter concerning the budget for the department of government headed by the extradition hearing officer. (A copy of the transcript is attached as Exhibit H.)

* * *

Item No. 12: While the legislation was awaiting approval from the Governor, several individuals, some representing electrical workers and other unions, went to see the

defendant to urge him to withdraw the legislation. They explained to the defendant that the legislation was dangerous, that it would break down licensing ordinances, and that it would result in higher insurance premiums for the general public. The defendant responded that he had already accepted fees ($5,000 from 4 or 5 people) which would have to be refunded if the bill did not pass. After listening to their arguments, the defendant conceded that his bill could have adverse effects, but he implied that he had already spent the fees he had accepted and did not have the funds to make the refund that would be necessary if he withdrew the legislation. The defendant then suggested to at least one of the individuals that if he or the unions could supply the money needed to make the refunds then he could withdraw the legislation. The defendant's suggestion was rejected.

The proof would show that the individuals who had met with the defendant to urge him to withdraw the legislation, and others, then contacted the Governor, explained their opposition to the Governor, and explained the defendant's position to the Governor. On April 3, 1972, the Governor vetoed Senate Bill 1783. (A copy of the veto message is attached as Exhibit M.)

April 3, 1972

Dear Mr. Speaker:

I hereby veto Senate Bill 1783.

This legislation would require any municipal government with a population of 39,000 or more or any county government with a population of 65,000 or more which licenses any trade, craft, service or occupation to license any individual who makes proper application without further examination if that individual has been duly licensed or otherwise authorized to perform the trade, craft, service, or occupation in any city of the state with a population of 39,000 or more or any county in the state with a population of 65,000 or more. This means that any person licensed by the government of Nashville, Memphis, Knoxville, Chattanooga, Jackson, Shelby County, Knox County, or Madison County would be able to practice his occupation in any of these jurisdictions without further examination or without meeting specific requirements established by the jurisdiction from which he is seeking authorization.

The changes anticipated by this legislation would be well founded, in my judgment, only if there were some uniformity in examinations or licensing standards from one jurisdiction to another throughout the state. But there is no doubt that standards vary greatly from one jurisdiction to another and that this reciprocity procedure would tend to un-

dermine the control which local officials exercise over licensing in their jurisdictions.

Proponents of this measure have contended that the exclusive control by local licensing boards over the right to do business within a jurisdiction has tended to create monopolies among contractors or has had a depressing effect on competition. If this is the case and this problem does exist, such situations clearly need rectifying. But I fail to see that this legislation would alleviate those circumstances. I believe that, rather, it would undermine the effective control of elected local representatives and their authorized boards over the regulation of services which vitally affect local citizens.

Before establishing such reciprocity, I believe the General Assembly should consider the feasibility of establishing uniform examinations and licensing standards throughout the state. Once such uniformity is established, it very well may be appropriate to consider reciprocity among local jurisdictions—including all local governments in the state and not just those twelve jurisdictions mentioned in this legislation. It is the consumer whom the statutory law should protect by establishing certain standards of competency.

It is for these reasons that I take this action.

Sincerely,

/s/ Winfield Dunn

We believe that the extent of the privilege granted in this case must be measured by the Supreme Court's views on the extent of immunity granted by the United States Constitution's Speech or Debate Clause, since the values protected by each are basically identical. Having said this does not, however, easily resolve the question of the admissibility of the four items above. While there is broad general language in older cases dealing with the clause, in more recent cases the Supreme Court majority has narrowed the immunity granted to members of Congress.

In 1881, in the first case in which the Supreme Court construed the Speech or Debate Clause, it held that immunity extended to all "things generally done in a session of [Congress] by one of its members in relation to the business before it." *Kilbourne* v. *Thompson*, 103 U.S. 168, 204 (1881). This broad standard could arguably extend immunity to almost any act of a Congressman "relating to" the exercise of his powers of office, providing only that similar acts were "generally done" by other members of Congress.

In 1966, however, the Supreme Court held that the Constitutional immunity did not apply to prosecutions which do not "draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). The Court added:

> No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was

involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.

United States v. *Johnson, supra* at 172.

Then in 1972, Chief Justice Burger, writing for a majority of six, specifically narrowed the interpretation which might otherwise be placed on earlier cases:

> It is well known, of course, that Members of the Congress engage in many activities other than purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a session of the House by one of its members in relation to the business before

it," *Kilbourn* v. *Thompson, supra,* at 204, or things "said or done by him, as a representative, in the exercise of the functions of that office," *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808).

* * *

In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the due functioning of the process.[10] Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

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[10] *See Kilbourn* v. *Thompson,* 103 U.S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandhove,* 341 U.S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson,* 383 U.S. 169 (1966) (making a speech on House floor); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack,* 395 U.S. 486 (1969) (voting for a resolution).

In *Coffin* v. *Coffin,* 4 Mass. 1 (1808), the state equivalent of the Speech or Debate Clause was held to be inapplicable to a legislator who was acting outside of his official duties.

United States v. *Brewster,* 408 U.S. 501, 512-13, 515-16 & n. 10 (1972).

This view was still further spelled out in *Gravel* v. *United States,* 408 U.S. 606 (1972), where a 5-4

Court held that Senator Gravel's arrangement to publish the Pentagon Papers was not protected by the Speech or Debate Clause:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations." *United States* v. *Doe*, 455 F. 2d, at 760.

Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the Senate. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

> There are additional considerations. Article I, § 6, cl. 1, as we have emphasized, does not purport to confer a general exemption upon Members of Congress from liability or process in criminal cases. Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause.
>
> *Gravel* v. *United States*, *supra* at 625-26 (footnote omitted).

See also Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Powell* v. *McCormack*, 395 U.S. 486 (1969), and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967).

Our review of these cases convinces us that only one of the four items which we deal with in this section should have been suppressed. That one is Item 3(a), *supra*—Gillock's request for an opinion as to the constitutionality of extradition for a misdemeanor. Even though there was no specific legislation at that time authorizing a legislator to make such a request, *see* TCA § 8-609(6) (1973 ed. & 1977 Cum. Supp.), this request directly related to the legislative process.

As to Items 8, 12 and the Governor's veto message, we believe they are admissible under the standards

of *United States* v. *Brewster, supra,* and later cases. Gillock has no right to claim his speech or debate privilege as to the Governor's exercise of the gubernatorial right of veto. Items 8 and 12 appear to us to be well outside of the ambit of legislative activity.

For the reasons set forth above, the judgment of the District Court is modified by our ruling that Items 8, 12 and the Governor's veto message are admissible and in all other respects is affirmed.

WEICK, Circuit Judge, dissenting. The Speech or Debate privilege for state legislators provided in the Constitution of the State of Tennessee is relevant only where state law is applicable, and affords no protection to state legislators who are being prosecuted in a federal court for committing a federal crime. In a federal prosecution the existence of a privilege of a witness is to be determined by the federal law of evidence. *United States* v. *Craig,* 537 F.2d 957, 958 (7th Cir. *en banc,* 1976), *cert. denied sub nom., Markert* v. *United States,* 425 U.S. 973 (1976).

The Speech or Debate privilege provided in the Constitution of the United States applies only to Congressmen, and not to state legislators. *United States* v. *DiCarlo,* 565 F.2d 802 (1st Cir. 1977), *cert. denied,* 46 U.S.L.W. 3586 (U.S. March 20, 1978).

There is no federal common law speech or debate privilege protecting state legislators who commit federal crimes. *United States* v. *DiCarlo, supra; United States* v. *Craig, supra.* It is submitted that at this late date the federal courts ought not to innovate and

create a new privilege for the protection of state legislators who violate the criminal laws of the United States. The relevant and material evidence of all of their acts in committing federal crimes should be admitted in evidence, including legislative acts and motivations therefore, which ought not to be suppressed. It is not unreasonable to believe that public confidence in the administration of justice in the federal courts will be undermined if state legislators are permitted to violate, with impunity, the criminal statutes of the United States because of a court-created special privilege in their favor, but not in favor of any other person, which privilege results in the suppression of relevant and material evidence of the criminal conduct of the state legislators.

I

Under Rule 26 of the Federal Rules of Criminal Procedure the admissibility of a witness' testimony is governed by Acts of Congress, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. Rule 501 of the Federal Rules of Evidence specifically addresses the issue of privilege, and provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be

> interpreted by the *courts of the United States* in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. [Emphasis added.]

Under Rule 501 the privilege of a witness in a federal criminal prosecution is governed, not by state law, but by the principles of the common law as interpreted by the federal courts in the light of reason and experience.

It is clear that under the last sentence of Rule 501 the state law of privilege is to be applied only in civil actions or proceedings where state law supplies the rule of decision. State law does not supply the rule of decision in a federal criminal prosecution. Certainly the present case is not a civil action or proceeding, but is a federal prosecution of a state senator for accepting bribes in violation of the Hobbs Act. Reliance by the District Judge and by the majority opinion here, on Rule 501 for a federal privilege to suppress evidence of the state senator's acts in accepting bribes, is misplaced. No license to state legislators to accept bribes in violation of federal criminal statutes can be found in the federal common law, or in Rule 501.

The two Federal Appellate Courts that have considered the specific problem presented by this appeal have denied the existence of the asserted privilege.

In the first case to consider the question, *United States* v. *Craig*, 528 F.2d 773 (1976), a majority of a panel of the Seventh Circuit held that a state legislator was entitled to a federal common law speech or debate privilege in a federal criminal prosecution, but that he had waived such privilege. On rehearing *en banc*, *United States* v. *Craig*, 537 F.2d 957 (7th Cir.), *cert. denied sub nom.*, *Markert* v. *United States*, 425 U.S. 973 (1976), a majority of the *en banc* court, adopting the opinion of concurring panel member Judge Tone, held that no such privilege exists, and reversed the order of the District Court suppressing evidence of the defendant's legislative acts and legislative motivations, and remanded with instructions to deny the motion to suppress.

Similarly, the First Circuit in *United States* v. *DiCarlo*, 565 F.2d 802 (1977), *cert. denied*, 46 U.S.L.W. 3586 (U.S. March 20, 1978), in affirming the conviction of two state legislators for violations of the Hobbs Act and Travel Act, held that the Speech or Debate Clause in the Federal Constitution does not apply, nor purport to apply, to state legislators, and that the federal common law recognizes no speech or debate privilege applicable in a federal criminal prosecution of a state legislator.

The only other Court to consider the matter is the Third Circuit in *In re Grand Jury Proceedings*, 563 F.2d 577 (1977). There the Court, in dictum, recognized the existence of the privilege, rejected the decision of the *en banc* court in *United States* v. *Craig*, *supra*, and instead, followed the reasoning of the

overruled panel majority. Gibbons, Circuit Judge, concurred in the result. In Judge Gibbons' opinion he stated that federal criminal law is as fully applicable to state legislators as it is to any other resident of the United States. He disagreed with the majority's dictum that there is some sort of federal common law evidentiary privilege which permits state legislators to decline to testify about their legislative acts or motivations for those acts.

We should follow the decisions of the *en banc* court in *United States* v. *Craig*, *supra*, and the First Circuit in *United States* v. *DiCarlo*, *supra*, and the concurring opinion of Judge Gibbons in *In re Grand Jury Proceedings*, *supra*. Accordingly, we should hold that the common law, as interpreted in the light of reason and experience, does not afford a state legislator a speech or debate privilege in a federal criminal prosecution.

II

The purpose of a trial is to determine the truth, which can never be ascertained if we invent new privileges to withhold or to suppress relevant and material evidence.

Federal courts, in consonance with the anicent maxim that the "public has a right to every man's evidence," 8 J. Wigmore, Evidence § 2192 at 70 (McNaughton rev. ed. 1961), should not create a new privilege in the absence of good reason therefor.

> The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of . . . privileges. They should

> be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice. [Footnote omitted.]

Id. § 2192 at 73. *Accord*, *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

The history of the speech or debate privilege indicates that it extends directly to the bitter and protracted struggle for power between the Crown and Parliament, which disrupted England for centuries, *United States* v. *Johnson*, 383 U.S. 169, 178 (1966), *Tenny* v. *Brandhove*, 341 U.S. 367, 372 (1951). This conflict was characterized by the harassment of members of Parliament who criticized the Crown, the Crown contending that there was no privilege with respect to matters relating to its prerogatives, and Commons claiming an absolute privilege of speech or debate in connection with any subject touching parliamentary matters. 4 W. Holdsworth, A History of English Law 89-93 (2d ed. 1937).

It was this conflict, developed over the respective powers of two coordinate branches of the Government, executive and legislative, that was at the core of the development of the privilege. Thus, when viewed as a derivative of the historical processes that created it, it becomes apparent that the speech or debate privilege has relevance only in the context of a single Government.

The Supreme Court, in interpreting the Federal Speech or Debate Clause, has recognized the historic

purpose of the privilege as the preservation of legislative independence and integrity in the context of a governmental system of separation of powers. In *United States* v. *Brewster*, 408 U.S. 501, 508 (1972), the Court stated:

> Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government. [Footnote omitted.]

To the same effect, *see Gravel* v. *United States*, 408 U.S. 606, 616 (1972), in which the Court stated:

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.
>
> [*Id.* at 616]
>
> [T]he central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson*, 383 U.S. 169, 181 (1966) . . . .
>
> [*Id.* at 617]

See also Doe v. *McMillan*, 412 U.S. 306, 311 (1973).

There being no problem of separation of powers between the federal government and a state legislator, *Elrod* v. *Burns*, 427 U.S. 347, 352 (1976), a federal common law speech or debate privilege cannot logically exist.

This conclusion is reinforced by the fact that none of the decisions of the Supreme Court recognizes such a privilege. *Tenny* v. *Brandhove*, 341 U.S. 367 (1951), upon which the defendant relies heavily in support of his contention that the federal common law recognizes a speech or debate privilege applicable to state legislators, was not decided on that basis. Even though the Supreme Court in *Tenny* discussed at some length the speech or debate privilege, its holding was quite narrow, namely, that legislators are immune from civil suits for money damages brought upnder the Civil Rights Act (now codified at 42 U.S.C. §§ 1983, 1985) for their legislative acts. In *Tenny* the Court was not applying a federal common law speech or debate privilege, but rather, was applying the common law doctrine of official immunity. *In re Grand Jury Proceedings*, *supra* at 581; *Craig* v. *United States*, 428 F.2d 773, 782 (1976); *see United States* v. *DiCarlo*, 565 F.2d 802, 806 (1977).

Furthermore, I have been unable to find any decision of a federal appellate court, other than the

dictum in *In re Grand Jury Subpoenas, supra*, that supports such a privilege. An indication that no federal common law speech or debate privilege exists can be discerned from the cases dealing with attempts to obtain injunctions against legislators. Although federal courts have declined to enjoin the acts of Congressmen, holding that such an interference with legislative acts would violate the Speech or Debate Clause of the Federal Constitution, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), *Doe* v. *McMillan*, 412 U.S. 306 (1973), *Powell* v. *McCormack*, 395 U.S. 486 (1969), similar attempts to obtain injunctions against state legislators have been successful. *Bond* v. *Floyd*, 385 U.S. 116 (1966); *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963); *Bush* v. *Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.) (three-Judge District Court), *aff'd sub nom.*, *Denny* v. *Bush*, 367 U.S. 908 (1961). Clearly if a federal common law speech or debate privilege exists, injunctive relief against state legislative action which violates federal law could not be granted.

Judges have no immunity for crimes committed by them during the terms of their office or prior thereto. *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938). Nor have the judges any privilege to exclude evidence of crimes committed by them. In *Manton* the judge did not even question evidence showing that his opinions favored bribers. No federal official has ever been

held exempt from prosecution for his commission of a federal crime.

In my opinion it is apparent that no speech or debate privilege has been extended to state legislators as a matter of federal common law. Rather, any protection afforded state legislators is based on the common law doctrine of official immunity. *United States* v. *DiCarlo, supra; United States* v. *Craig, supra.*

Although similar to the speech or debate privilege in its recognition of the need for government officials to be functionally independent, official immunity differs from the speech or debate privilege in significant respects. Some officials enjoy only a qualified immunity. Regardless of whether the immunity is absolute or qualified, its protection against liability for official acts does not extend to criminal prosecutions. *Imbler* v. *Pachman*, 424 U.S. 409, 429 (1976); *O'Shea* v. *Littleton*, 414 U.S. 408, 503 (1974); *Gravel* v. *United States*, 408 U.S. 606, 627 (1972); *United States* v. *DiCarlo*, 564 F.2d 802, 806 (1977); *In re Grand Jury Subpoenas, supra* at 581; *United States* v. *Craig, supra; United States* v. *Anzelmo*, 319 F. Supp. 1106, 1118-19 (E.D. La. 1970).

In *O'Shea* v. *Littleton, supra* at 503, the Supreme Court stated:

> Whatever may be the case with respect to civil liability generally, see *Pierson* v. *Ray*, 386 U.S. 547 (1967), or civil liability for willful corruption, see *Alzua* v. *Johnson*, 231 U.S. 106, 110-111 (1913); *Bradley* v. *Fisher*, 13 Wall. 335, 347, 350, 354 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contem-

plates the immunization of otherwise criminal deprivations of constitutional rights. Cf. *Ex parte Virginia*, 100 U.S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress . . . ." *Gravel* v. *United States*, 408 U.S. 606, 627 (1972).

Because official immunity affords no protection from criminal liability for acts committed in an official capacity, it follows logically that in a criminal prosecution of a government official, official immunity provides no evidentiary privilege against disclosure of his official acts or the motivation for them comparable to that accorded to Congressmen by their speech or debate privilege. *United States* v. *DiCarlo*, *supra* at 806-07; *United States* v. *Craig*, *supra*.

III

I am of the opinion that neither reason nor authority supports the transformation of the doctrine of official immunity into a federal common law speech or debate privilege. Nothing in our history, nor in any of the authorities cited by the defendant or relied upon by the dictum of the Third Circuit or the panel majority in *United States* v. *Craig*, *supra*, involved abuses of the type which would warrant the creation of such a privilege, namely, interference by the federal government with the independence of state legislators. I believe, however, that the nature of the American judicial and political systems makes re-

mote such a possibility of interference. Before any prosecution against a state legislator can succeed the federal government must convince both a grand jury and a petit jury of the legislator's corruption. This Court should be unwilling to assume that these bodies will act against a state legislator without the requisite proofs. *Cf. United States* v. *Brewster*, 408 U.S. 501, 522 n.16 (1972).

Because the federal government can prosecute state legislators for violations of the federal criminal law, *In re Grand Jury Subpoenas*, *supra*; *United States* v. *Craig*, *supra*; *cf. United States* v. *Brewster*, *supra*, we see no substantial increment in federal power over state legislators resulting from denial of the privilege. Indeed, the exclusion from evidence of legislative acts and legislative motivations may well make a conviction of a state legislator for violation of federal criminal law, impossible.

To permit state legislators to avoid with impunity federal criminal liability for their official acts, "perhaps even more than the increased [federal] power, would gravely undermine legislative integrity and defeat the right of the public to honest representation." *United States* v. *Brewster*, *supra* at 524-25.

Furthermore, an examination of the consequences of a holding that recognizes a federal common law speech or debate privilege for state legislators strongly militates against its adoption. By recognizing such a privilege the Court would eventually become enmeshed in a quagmire of complex policy decisions, such as whether the privilege extends beyond state

legislators to the plethora of other state legislative and quasi-legislative bodies such as city councils and school boards, and whether the privilege applies to civil as well as criminal proceedings. *In re Grand Jury Proceedings, supra* at 586-87 (Gibbons, J., concurring).

These questions are best left for Congress, which "at the federal level . . . has freedom to determine whether a statutory [speech or debate] privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Branzburg* v. *Hayes*, 408 U.S. 665, 706 (1972).

Because there is no federal common law speech or debate privilege, it is not necessary to discuss the second issue presented by this appeal, namely, whether the District Court properly applied the privilege to all items of evidence suppressed.

The suppression order of the District Court should be reversed and the case remanded with directions to deny the motion to suppress.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

CR-76-104

UNITED STATES OF AMERICA,

v.

EDGAR H. GILLOCK

OFFER OF PROOF

I. PRELIMINARY STATEMENT

On December 3, 1976, after pre-trial motions and argument, the Court entered an Order suppressing the introduction of any evidence concerning the defendant's "legislative acts and motivation therefor." Upon appeal from that Order, the Court of Appeals vacated the suppression order, finding that the appeal was premature because the suppression order "did not apply to particularized items of evidence," and remanded the case to this Court for further proceedings. The Court of Appeals suggested that the government file a formal bill of particulars or offer of proof setting forth specific categories of evidence or testimony to be tendered at trial.

The government will hereinafter set forth specific categories of evidence to be offered which may arguably be considered "legislative acts" or "motivation therefor."

The government will attempt to set forth in detail all such evidence, based on all the information available to the government at this time. In doing so, it will be necessary to set forth and outline some evidence which clearly would not be covered by the Court's suppression order, so that the relevance and relative importance of the evidence which might be covered can be examined in context.

Since the Court's original order suppressed not only legislative acts, but also any evidence of "motivation therefor," much of the evidence to be set forth will concern conversations between the defendant, or his agent,[1] and others both before and after any actual legislative activity.

In response to the Court's instructions, only an offer of proof will be made at this time, and such offer will be made on the assumption that federal courts recognize a common law speech or debate immunity. A memorandum of points and authorities opposing suppression of the evidence set forth herein

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[1] Some of the evidence to be set forth that relates to Count One will concern third-party conversations that occurred when the defendant was not present. It will be the contention of the government that those statements are admissible and constitute statements of the defendant because the proof will establish that the defendant and his agent were engaged in a common scheme or plan. *See United States* v. *Perna*, 491 F.2d 253 (6th Cir. 1974), *cert. denied*, 417 U.S. 934.

—and preserving for the record the government's position that there is no such immunity for state legislators charged with federal crimes—will be filed separately at a later date.

While there necessarily will be some overlap, particularly with regard to Count Seven, the proffered evidence will be set forth as it relates to particular counts by numbered, itemized categories.

II. COUNT ONE

In count one the indictment charges, in substance, that between January 1, 1975, and March 25, 1975, the defendant, being aided and abetted by John Hundley, attempted to obtain money from Ruth Howard by using his influence as an elected member of the Tennessee General Assembly in furtherance of a plan to block the extradition of James Michael Williams from Tennessee to Illinois.

The proof would show that on November 15, 1974, Williams was arrested in Memphis and was held as a fugitive from Illinois. In December and January, Ruth Howard, Williams' sister, came to Memphis to meet with Williams' attorney, John Hundley. In January, Hundley told Howard he had a "friend who could help her brother, but it would "cost a small sum of money." During her visit to Memphis Hundley introduced Howard to the defendant.

> *Item No. 1*: In March, 1975, Hundley and Howard went to Nashville for Williams' extradition hearing. Howard and Hundley met with the defendant before the hearing and Hundley ad-

vised Howard that the defendant could help her brother, but that the defendant needed "$1,500.00 now and $1,000.00 later." Howard and the defendant then discussed the details of the payments.

Item No. 2: (a) On or about March 6, 1975, the defendant appeared during the extradition hearing for Williams. When Charles Grigsby, the extradition hearing officer, questioned the defendant's presence, he stated that he was not there as an attorney or in his official capacity as a State Senator. However, during the hearing, the defendant questioned David Raybin, the Assistant Attorney General, about the propriety of extraditing on a misdemeanor charge.[2]

(b) During the hearing the defendant requested the Assistant Attorney General's file and reviewed the extradition papers.

(c) The defendant then asked the Assistant Attorney General to step out into the hall for a private conversation. At that time the defendant asked the Assistant Attorney General to postpone the hearing until after the Attorney General could render an official opinion on the question of extradition on a misdemeanor charge. The defendant was advised that he was entitled to an opinion from the Attorney General, but that he would have to make his request in writing through proper channels. (The defendant was entitled to request an opinion from the Attorney General by virtue of his status of State Senator. Only government officials, not attorneys, have the prerogative to request opinions.)

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[2] Williams had been serving a sentence in Illinois for reckless or disorderly conduct when he escaped and was subsequently picked up in Memphis.

(d) The defendant then suggested to the Assistant Attorney General that there was legislation "in the making" to prohibit the Governor from extraditing on a misdemeanor. The Assistant Attorney General rejected that suggestion on the grounds that extradition was a Constitutional question.

Item No. 3: (a) On March 6, 1975, the defendant made an official request in writing for an opinion from the Attorney General concerning "Extradition on a Misdemeanor." The request was made to Ray Ashley, Attorney General, with carbon copy to the Assistant Attorney General who had represented the state at the extradition hearing. (A copy is attached as Exhibit A.)

(b) On March 13, 1975, the defendant's request was routed to the Assistant Attorney General for preparation of a reply. (Attached as Exhibit B.)

(c) On March 27, 1975, the Office of the Attorney General rendered an opinion in response to the defendant's request. (Attached as Exhibit C.)

Item No. 4: (a) After the extradition hearing the defendant told Howard he had "a friend in the governor's office who, when paid off, would see to it that the extradition papers would never reach the governor." The defendant then asked Howard if she was sure she could raise the money, and when she told him she was sure, he instructed her to make the down payment in cash, and then disguise the balance as attorney's fee by executing a promissory note.

(b) On March 7, 1975, Howard and Williams executed a promissory note to the defendant and Hundley for $1,500.00.

Item No. 5: On March 18, 1975, Howard recorded a telephone call to Hundley, during which Hundley told Howard, in substance, that he had been in contact with the defendant, that he had told the defendant she had not yet paid the money, and that the defendant had told him he could still block the extradition if he got the money by the following Monday or Tuesday. (A copy of the transcript is attached as Exhibit D.)

Item No. 6: On March 19, 1975, Howard recorded a telephone call from Hundley, during which Hundley told Howard, in substance, that the defendant had told him it would take him two or three days to get Williams out of jail after the defendant got the money. (A copy of the transcript is attached as Exhibit E.)

Item No. 7: (a) On March 21, 1975, Howard drove from St. Louis, Missouri, to Memphis for the purpose of making the $1,000.00 cash payment to the defendant.

(b) After her arrival in Memphis, Howard recorded a telephone call to Hundley, during which Hundley advised Howard, in substance, that he had been in contact with the defendant and the defendant had told him it was too late to block the extradition. (A copy of the transcript is attached as Exhibit F.)

(c) During the evening of March 21, 1975, Howard recorded several face-to-face conversations with Hundley, during which Hundley advised Howard, in substance, that the defendant

could have blocked the extradition if he had received the money in time. (A copy of the transcript of excerpts [3] of that recording is attached as Exhibit G.)

Item No. 8: On March 25, 1975, Howard recorded a call from the defendant, during which the defendant advised her, in substance, that he had caused the extradition to be held up and could have blocked the extradition because the extradition hearing officer had appeared before the defendant's committee on a matter concerning the budget for the department of government headed by the extradition hearing officer. (A copy of the transcript is attached as Exhibit H.)

Item No. 9: (a) On March 19, 1975, the defendant participated in a hearing conducted by the Senate Judiciary Committee, of which he was a member in the Tennessee Senate.

(b) During that hearing, Charles Grigsby, head of the Tennessee Law Enforcement Academy, appeared before the committee on a matter concerning the budget of the Tennessee Law Enforcement Academy.

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[3] The entire transcript, which is 33 pages, is being furnished to counsel for the defendant. Only selected excerpts have been attached as an exhibit because the government does not believe that the omitted portions could in any way constitute motivation for legislative action. If the government is wrong in this assumption, and the defendant's attorneys contend the omitted portions are covered by the Speech or Debate Immunity, then the transcript will be available for presentation to the Court.

III. COUNTS THREE-SIX

In counts three through six the Indictment charges, in substance, that between February 1, 1972, and April 7, 1972, the defendant attempted to obtain money from four named individuals by using his influence as an elected member of the Tennessee General Assembly in furtherance of a plan to guarantee the named individuals a master electrician's license.

The proof would show that in Tennessee before an electrical contractor can engage in electrical work the contractors must either have or employ someone who has a master electrican's license issued by the particular county or municipality in which the electrical work is to be done. In Shelby County, because of the complexity of the electrical code, the test administered to those seeking a master's license is extremely difficult, and therefore, the master's license is very valuable.

In early 1972, one of the four individuals named in counts three through six contacted the defendant to see if the defendant could be of assistance in obtaining a master's license. Subsequently, in late January or early February some or all of the four individuals met with the defendant and explained to him that they had been unable to obtain a master's license by passing the test. At that time, the defendant advised them that if he could find a way to get them a license he would let them know.

Item No. 10: Approximately two weeks after the initial meeting the defendant called and asked

the four individuals to come to his office. The defendant advised them that he had a way to enable them to obtain a master's license, but that it would cost them $5,000 each. The defendant explained that he could cause legislation to be enacted by the Tennessee General Assembly which would provide for reciprocity in licensing. The legislation would enable an individual who could not pass the difficult test in Shelby County, or Memphis, to obtain a license in another county, or municipality, where the test was not as difficult, and then require the larger county or municipality to recognize the master's license obtained elsewhere. The defendant explained that the $5,000 fee would be on a contingency basis, that is, if the individuals, or at least one of them, did not obtain their master's license within one year, their money would be refunded. Shortly thereafter, two of the four individuals put $5,000 in escrow pursuant to the defendant's proposition. One of the individuals had the defendant execute a written agreement. (A copy of that agreement is attached at Exhibit I.)

Item No. 11: (a) On March 6, 1972, the defendant introduced Senate Bill Number 1783, styled: "AN ACT to provide for reciprocity by municipalities and counties in this state to persons licensed or regulated to engage in a trade, craft, service or occupation." (A copy is attached as Exhibit J.)

(House bill Number 1888 had previously been introduced on March 3, or March 4, 1972. A copy is attached as Exhibit K.)

(b) On March 22, 1972, House Bill Number 1888 was substituted for Senate Bill Number 1783. On March 23, 1972, the defendant proposed an amendment to House Bill 1888 which, in effect, made the minimum population requirements conform to Jackson and Madison County. (A copy is attached as Exhibit L.)

(c) Any and all statements made by the defendant in support of the bill or bills, and the amendment thereto were recorded in the normal course of business of the Tennessee General Assembly and will be introduced as evidence. (Copies are maintained and can be obtained from the Senate and House Legislative Journals and the Library and Archives in Nashville.)

(d) The legislation as amended passed both branches of the legislature and was forwarded to the Governor.

The proof would show that shortly after he put his $5,000 in escrow for the defendant, Sammy Robbins received instructions to go to Jackson, Tennessee, and obtain a master electrican's license from that municipality.

Item No. 12: While the legislation was awaiting approval from the Governor, several individuals, some representing Electrical workers and other unions, went to see the defendant to urge him to withdraw the legislation. They explained to the defendant that the legislation was dangerous, that it would break down licensing ordinances, and that it would result in higher insurance premiums for the general public. The defendant responded that he had already accepted fees ($5,000 from 4 or 5 people) which

would have to be refunded if the bill did not pass. After listening to their arguments, the defendant conceded that his bill could have adverse effects, but he implied that he had already spent the fees he had accepted and did not have the funds to make the refund that would be necessary if he withdrew the legislation. The defendant then suggested to at least one of the individuals that if he or the unions could supply the money needed to make the refunds then he could withdraw the legislation. The defendant's suggestion was rejected.

The proof would show that the individuals who had met with the defendant to urge him to withdraw the legislation, and others, then contacted the Governor, explained their opposition to the Governor, and explained the defendant's posiiton to the Governor. On April 3, 1972, the Governor vetoed Senate Bill 1783. (A copy of the veto message is attached as Exhibit M.)

Item No. 13: (a) on April 13, 1972, the defendant moved to override the Governor's veto. The motion failed, seven "ayes", sixteen "no's" and two not voting.

(b) Any and all statements made by the defendant in support of his motion to override the veto of Senate Bill 1783 were recorded in the normal course of business of the Tennessee General Assembly and will be introduced as evidence.

Item No. 14: Subsequently,the two individuals who had put $5,000 in escrow received refunds from the defendant. All but $250 was refunded. The $250 was retained by the defendant as attorney's fees.

IV. COUNT SEVEN

In count seven the Indictment charges, in substance, that between January 1, 1972, and April 7, 1972, and between January 1, 1975, and March 25, 1975, the defendant was employed and associated with an enterprise (being an elected member of the Tennessee General Assembly) and did engage in the affairs of said enterprise through a pattern of racketeering activity by performing the acts set forth in Counts One through Six and by agreeing to accept things of value in exchange for his promise to exercise his influence, judgment and prerogatives under color of office.

The proof offered in support of Count Seven would include all of the evidence set forth in items 1-14 herein, and would include evidence setting forth the dates and times the defendant acted in an official capacity while performing his duties and serving as an elected representative. Additionally, the proof would include an explanation of the general function of the Tennessee General Assembly, the legislative process in the State of Tennessee, and the rights, duties and obligations of an elected representative.

Respectfully submitted,

W. J. MICHAEL CODY
United States Attorney

By /s/ GLEN REID, JR.
Glen Reid, Jr.
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Glen Reid, Jr., Assistant United States Attorney for the Western District of Tennessee, certify that a copy of the foregoing Offer of Proof has been forwarded to defendant's attorneys of record: Hal Gerber, 100 North Main Building, Memphis, Tennessee 38103; and James Neal, Third National Bank Building, Nashville, Tennessee 37219, via United States Mail, postage prepaid, this 1st day of September, 1977.

/s/ GLEN REID, JR.
Glen Reid, Jr.
Assistant United States Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 77-5335

[Filed Nov. 1, 1978]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Before: WEICK, EDWARDS and ENGEL, Circuit Judges

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennesseee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as modified.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Issued as Mandate: January 26, 1979

COSTS: None

Filing fee ..... $ ———

Printing ..... $ ———

Total $ ———

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5335

[Filed Jan. 17, 1979]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Before: EDWARDS, Chief Judge, WEICK and ENGEL, Circuit Judges

ORDER

On receipt and consideration of a petition for rehearing and a suggestion for rehearing en banc in the above-styled case; and

The majority of the judges in active service in this court not having voted in favor of the motion for rehearing en banc, and the motion for rehearing having been referred under the Rules of the United States Court of Appeals for the Sixth Circuit to the panel which heard the case; and

It appearing to the panel that no issue is presented by the motion for rehearing which had not been adequately considered before issuance of the opinion,

Said motion is hereby denied, Judge Weick dissenting.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5335

[Filed Jul. 12, 1977]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

EDGAR H. GILLOCK, DEFENDANT-APPELLEE

Before: EDWARDS, PECK and ENGEL,
Circuit Judges

ORDER

This is an interlocutory appeal from a pretrial order suppressing all evidence of the defendant's "legislative acts and motivation therefor." The indictment charges the defendant, a Tennessee state senator, with unlawfully interfering in an extradition proceeding, unlawfully attempting to use the prerogatives of his elected public office to guarantee the obtaining of master electrician's licenses, and participating in the conduct of the state legislative body through a pattern of racketeering activity.

Upon motion of the defendant, the court ruled that state legislators were entitled to assert an evidentiary speech or debate privilege pursuant to Rule 501, Fed-

eral Rules of Evidence, and entered the suppression order. The government has sought to perfect an appeal under 18 U.S.C. § 3731, filing herein the required certification by the United States Attorney.

Upon consideration of the record, however, the court is of the opinion that the appeal is premature and that the order should be vacated. The district court's decision does not apply to particularized items of evidence, but encompasses only a broad category. While the government had submitted a document entitled "a statement of theory", which described the general outline of the case against the defendant, no formal bill of particulars was filed, and no offer of proof was otherwise made. Because the order lacks specificity, a review at this stage of the proceedings would effectively require the court to render an advisory opinion. *Compare United States* v. *Fruehauf*, 365 U.S. 146 (1961) (premature appeal); *Nixon* v. *Sirica*, 487 F. 2d 700, 721 n. 100 (D.C. Cir. 1973) *with United States* v. *Abraham*, 541 F. 2d 624 (6th Cir. 1976) (jurisdiction upheld); *United States* v. *Battisti*, 486 F. 2d 961 (6th Cir. 1973) (jurisdiction upheld).

IT IS ORDERED that the suppression order be vacated and the case remanded to the district court for further proceedings consistent herewith, without prejudice to any right of the government to seek a more specific determination by the district court with respect to the admissibility of particular testimony

or other evidence which may be tendered for use at the trial.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Criminal CR 76-104

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

MEMORANDUM DECISION AND ORDER GRANTING MOTION TO SUPPRESS EVIDENCE

Following this court's memorandum decision and order of December 3, 1976, granting defendant's motion to suppress with respect to all of his "legislative acts or motivation therefor," the Government took an interlocutory appeal pursuant to 18 USC § 3731. The Government contended, on appeal, that defendant, as a state senator, has no speech or debate evidentiary privilege with respect to this federal prosecution. However, by order entered on July 12, 1977, the Court of Appeals held that the appeal was premature and that this court's order of suppression should be vacated. The basis for the decision of the Court of Appeals was that this court's suppression order "does not apply to particularized items of evi-

dence, but encompasses only a broad category" and that therefore a review of this court's ruling "would effectively require the [Court of Appeals] to render an advisory opinion." The Court of Appeals in effect invited the Government to obtain a ruling from this court as to the specific items of evidence that would be covered by the speech or debate privilege by filing a bill of particulars or offer of proof.

The Government on September 1, 1977, filed an "Offer of Proof," supplemented on September 19, delineating the proof it would offer at trial, together with a memorandum stating its position. In the memorandum, the Government, without conceding its basic position that defendant has no evidentiary privilege at all, concedes that certain of its items of evidence would be covered by the privilege. Defendant has filed a response in which it is contended that still other items of evidence would be covered by the privilege.

Before ruling on the question as to which of these items of evidence are covered by the privilege and therefore should be suppressed, we point out that, subsequent to our memorandum decision of December 3, 1976, holding that defendant does have a speech or debate privilege, the Court of Appeals for the Third Circuit likewise so held. *In Re: Grand Jury Proceedings*, —— F.2d —— (3rd Cir. Nos. 77-1970/1 and 77-2051/2/3, September 7, 1977.)

We conclude that, while the defendant's evidentiary privilege is in no wise grounded in the federal constitutional provision creating the privilege enjoyed by Members of Congress, the limits of the Congressional privilege should be applied here. This seems to be the conclusion of the Third Circuit in the decision just cited. More specifically, we believe the decision of the Supreme Court in *United States* v. *Brewster*, 408 U.S. 501 (1972), dealing with the privilege of federal legislators, is the yardstick to be applied here since such is a recent decision and deals with an analogous situation.

In *Brewster*, a United States Senator had been indicted for allegedly taking bribes in return for his being influenced as to his actions and votes and decisions on postage rate legislation. While the Court agreed that the Senator's votes, speeches and actions on the floor or other legislative acts could not be proven, other evidence might be introduced that could sustain a conviction. The Court said (at 526-527):

> The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. * * * * Nor is inquiry into a legislative act or the motiva-

tion for a legislative act necessary to a prosecution under this statute or this indictment. * * * *

Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

It is agreed by the parties that items 9(a), 9(b), 11(a) first sentence, 11(b), 11(c), 11(d), 13(a) and 13(b) would be subject to the privilege. We do not believe that 11(a) second sentence would be subject to the privilege since it only has to do with the introduction of a bill in the lower house and not by defendant. On the other hand, the supplement to the offer of proof would be subject to the privilege since it has to do with defendant's causing members of the lower house to introduce such bill in the lower house.

With respect to items 3(a), 3(b) and 3(c), we agree with defendant that such would be covered by the privilege. These have to do with defendant's seeking and obtaining an opinion by the state Attorney General as to whether a person may be extra-

dicted for a misdemeanor committed in another state. We reach the conclusion because, as pointed out by defendant and as demonstrated in the Government's brief in the Court of Appeals, it is the Government's very theory that in seeking and obtaining such opinion, defendant afforded himself of a right which he possessed as a state senator.

We agree with defendant that item 12 is subject to the privilege since the evidence would make no sense unless the witnesses were allowed to refer to legislation that defendant had introduced.

We agree with defendant that item 8 is subject to the privilege since as pointed out by defendant, the Government conceded in its brief in the Court of Appeals that such evidence could only be made relevant by showing that defendant was a member of a senate committee and attended a particular committee meeting at which Grigsby appeared.

We agree that the Governor's veto would be subject to the privilege since such would be relevant only on the inference that defendant had voted for the passage of the bill.

We believe it would be permissible for the Government to show generally the function of the Tennessee legislature and of the two houses thereof and that defendant is a state senator, for otherwise the jury would not know that defendant is a senator and might not know what a state senator is and his function in state government.

In summary, this court concludes that the following, but only the following, items of evidence as de-

lineated in the Government's "Offer of Proof" will be suppressed: 9(a), 9(b), 11(a) first sentence and supplement, 11(b), 11(c), 11(d), 13(a), 13(b), 3 (a), 3(b), 3(c), 12, 8 and the Governor's veto message.

It is so ORDERED.

ENTER this 28th day of September, 1977.

/s/ Bailey Brown
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Criminal CR 76-104

UNITED STATES OF AMERICA

v.

EDGAR H. GILLOCK

MEMORANDUM DECISION AND ORDER

This cause has been before this court on two prior occasions on various motions, and the court entered memorandum decisions on October 5 and November 9, 1976. Since then, defendant has filed additional motions that have been argued.

One of these motions (a renewed motion) is to dismiss Count VII on the ground that the State legislature is not an "enterprise" within the meaning of 18 U.S.C.A. § 1961 upon which the Count is based. The main argument here is, in general, that the statute contains a definition for "State," which includes subdivisions and instrumentalities of States (which would include the legislature) and also includes a separate provision that defines "enterprises." The defendant's further argument is that an interest in an enterprise acquired in violation of the statute

may be declared forfeited but that a State senator's position in the legislature could not be forfeited to the United States.

In response, the government points out that the statutory definition of an "enterprise" includes an "individual" and that an individual could not, as an office in the legislature could not, be forfeited to the United States. The government's main argument is based on the broad definition of "enterprise" contained in the statute, which includes ". . . any . . . association, or other legal entity, and any . . . group of individuals associated in fact although not a legal entity." Moreover, as the government points out, in *United States* v. *Frumento*, 405 F.2d 23 (E.D. Pa. 1975), the Court held that an "enterprise" under § 1961 included the Bureau of Cigarette and Beverage Taxes of Pennsylvania. Further, as the government also points out, in *United States* v. *Hawes*, 529 F.2d 472 (5th Cir. 1976), it is stated that (at 479) the word "enterprise" should be given a "very broad meaning."

Defendant advances other and less well-founded grounds for dismissing Count VII which need not be dealt with in this memorandum.

Accordingly, we conclude that the motion to dismiss Count VII must again be overruled. It is so ORDERED.

Defendant also moves to suppress ". . . as evidence . . . all legislative proceedings, including the drafting, introduction, amendment, passage, veto, and attempts to override such veto of Senate Bill No.

1783 (House Bill No. 1888)" on the ground that the introduction of such evidence would violate the defendant's speech or debate privilege.

This court dealt with defendant's claimed speech or debate privilege in the memorandum of November 9. On that occasion the privilege was relied upon by defendant in support of a motion to dismiss the indictment. In the memorandum, we pointed out that the only case that deals with the privilege (with respect to state legislators where a federal criminal prosecution is involved) is *United States* v. *Craig*, 528 F.2d 773, 537 F.2d 957 (*en banc*), (7th Cir. 1976). In that case, the court, *en banc*, by a five to three vote, held that a state legislator has no speech or debate privilege vis-a-vis a federal criminal prosecution. We further pointed out in the memorandum that even if defendant had a speech or debate privilege upon which he could rely here, he still could be prosecuted for (and evidence could be introduced to support) an agreement to receive or the receipt of a bribe to influence defendant's performance of his function as a legislator and that therefore the speech or debate privilege could not be the basis for dismissal of the indictment. This conclusion had two bases. The first was that even under the minority (*en banc*) view in *Craig*, defendant has no immunity from prosecution and that he has only an evidentiary privilege. The second basis was that, by analogy to the speech or debate privilege applicable to members of Congress, the defendant's privilege, if he had one, would only prohibit the showing of ". . . legislative

acts or the motivation for legislative acts." *United States* v. *Brewster*, 408 U.S. 507 (1972) at 512.

At this point we should make clear that, with respect to the instant motion, defendant's counsel, at argument, conceded that defendant's privilege could be no broader than that of a member of Congress as indicated in *Brewster, supra.*

Thus the question presented is whether there is an evidentiary privilege with respect to defendant's "legislative acts or motivation for legislative acts."

As we pointed out in the memorandum of November 9, all of the judges in *Craig* agreed that there is no immunity from prosecution as a result of the speech or debate clause in the federal or state Constitutions and that there is no federal common law immunity from prosecution. The division between the majority and minority was as to the question whether there is a privilege under Rule 501 of the Rules of Evidence in the United States Courts. Rule 501 provides in relevant part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

As we read Judge Tone's concurring opinion in *Craig* (which became the majority view of an *en*

banc court), this reason for holding that there is no speech or debate privilege for state legislators in this context is this: that the reason for the speech or debate privilege in the federal Constitution is to maintain the principle of the separation of powers of Congress vis-a-vis the federal executive branch; there being no problem of separation of powers as between the federal executive and the state legislatures, the federal Constitution creates no speech or debate privilege for state legislators and the federal courts should not recognize one pursuant to Rule 501 of the Rules of Evidence.

As we read Judge Cummings' opinion in *Craig* (which became the minority view of the *en banc* court), his reason for holding that there is a privilege under Rule 501 is this: that while separation of powers is one of the reasons for speech or debate protection for members of Congress in the federal Constitution and for members of legislatures in state constitutions, it is not the *only* reason; moreover the very nature of our federal system, with our federal government being one of limited powers, as well as a continuing need to maintain federal-state relations in appropriate equilibrium require that state legislators have the protection of the speech or debate privilege vis-a-vis the federal executive branch and it prosecutors.

Upon consideration, we conclude that Judge Cummings has the better of the debate, particularly in the light of some language in a couple of Supreme

Court opinions dealing with the reason for the speech or debate privilege.

In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), the precise question presented was whether state legislators, in performing legislative functions, could be civilly liable (under an Act of 1871, now 42 USCA § 1983) for damages for violating a person's civil rights. The Court concluded that, in enacting § 1983, Congress did not intend to create such liability. While, of course, the question in *Tenney* is not the same as the question here, some of the language in *Tenney* as to the reason for the speech or debate privilege is applicable. The Court said, *inter alia*:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.
>
> at 372.
>
> * * * *
>
> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that

> liberty may occasion offence." II Works of James Wilson (Andrews ed 1896) 38.
>
> at 373.
>
> * * * *
>
> As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.
>
> at 375.

Also, it is appropriate to point out that the Court indicated doubt as to whether Congress could, under the federal Constitution, limit the speech or debate freedom of state legislators. It said at 376:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle.

In *United States* v. *Brewster*, 408 U.S. 501 (1972), in the majority opinion by Chief Justice Burger,

while it held that the speech or debate privilege does not afford protection except as to legislative acts or motivation for legislative acts of members of Congress, it states at 507-508:

> The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in United States v. Johnson, 383 US 169, 15 L Ed 2d 681, 86 S Ct 749 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout the United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." Id., at 178, 15 L Ed 2d at 687 (footnote omitted).

We conclude that, under Rule 501 of the Rules of Evidence, defendant has a speech or debate privilege with respect to, but only with respect to, his legislative acts and motivation therefor because we believe that such is required, as stated in the Rule, "by the principles of the common law" as they are

interpreted "in the light of reason and experience." The reasons for the conclusion are these. The privilege is necessary, to paraphrase Chief Justice Burger in the *Brewster* case, to protect the integrity of the legislative process by insuring the independence of individual legislators, not simply for the personal or private benefit of legislators. To the extent that venal legislators might go unconvicted because of the government's being barred from proving legislative acts and motives, this is the price that the Founding Fathers believed we have to pay for legislative independence. Such freedom of our state legislators from federal criminal prosecutions, which call into question their legislative acts and motives, is necessary to preserve the constitutional relation between our federal and state governments in our federal system.

Accordingly, the motion of defendant to suppress evidence, to the extent indicated herein, will be granted. It is so ORDERED.

At argument, counsel for the defendant questioned government counsel whether, in the event this court granted defendant's motion to suppress, the government would appeal or go ahead with the trial on December 6. Presumably defendant's counsel had in mind 18 USCA § 3731 which provides in part:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court's suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the

defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Government counsel replied that the government would proceed to trial.

ENTER this 3rd day of December, 1976.

/s/ Bailey Brown
Chief Judge

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